Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2494

Appeal PA-040327-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

On July 18, 2003, a search warrant was executed by the Ontario Provincial Police at a home shared by the requester and her partner (referred to as the "named individual" in this order.) The search warrant related to a law enforcement issue not relevant to the requester's subsequent request. During the execution of the warrant, the OPP seized two firearms, and subsequently charged the requester and the named individual with firearms related charges under the *Criminal Code*. These charges were subsequently withdrawn.

The requester filed an access-to-information request with the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to all and any information relating to her Firearms Possession Licence, currently and in the past. The scope of the request included:

- Dates and names of persons/agencies submitting or retrieving data regarding her firearms licence and/or its status, and copies of those communications.

- All and any communications between the Chief of Firearms Office (CFO)/representatives and the Canadian Firearms Registry.

- All and any communications between CFO/representatives and the Ontario Ministry of the Attorney General and the Ontario Provincial Police (OPP).

- Copies of all information received by the CFO pertaining to her firearms possession status.

- Copies of any CPIC or ICON or other database information generated at the time containing information related to her firearms licence and its status, or provisions made to its status relating to Criminal Code charges laid against her regarding a specific Police Case ID number/occurrence.

- A copy of the daily notes of [two named OPP constables] for July 19, 2004 relating to an inquiry made by the requester by telephone concerning the status of her Firearms Possession Licence.

- A copy of any information concerning the requester or her firearms licence which [one named OPP constable] accessed on July 19, 2004, and at any other time.

- Copies of any communications [two named OPP constables] may have generated or received regarding the requester's status in relation to a specific Police Case ID number/occurrence and the status of her firearms licence.

- A copy of any information (retrieved data-based information, police notes, emails to and from others) concerning the requester, a specific Police Case ID number/occurrence, or her firearms licence generated or received by [eight named OPP officers].

- A copy of any information (retrieved data-based information, discussion notes, emails to and from others) concerning the requester, a specific Police Case ID number/occurrence, or her firearms licence, generated or received at the office of the Ministry of the Attorney General of Ontario, including but not limited to [six named officials].

The Ministry denied access to the responsive records, in full, pursuant to sections 49(a), 14(1)(a), 14(1)(b), 14(1)(f), 14(1)(1), 14(2)(a), 19, 49(b), 21(2)(f) and 21(3)(b) of the *Act*. The requester (now the appellant) appealed the Ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

At the onset of mediation, the Ministry informed the mediator that the records at issue could not be forwarded to the IPC, because the records were before the courts in a related law enforcement matter. The IPC's mediator had conversations with both the appellant and the Ministry. She reviewed the issues in dispute and the application of exemptions with the parties. Upon learning that a plea agreement had been reached in the related law enforcement matter, the mediator contacted the Ministry. The Ministry stated that it would review its decision upon the expiry of the appeal period in the related law enforcement matter. The Ministry, however, also indicated that a review of its decision might not lead it to amend its position regarding disclosure of the requested information.

At the conclusion of the mediation process, the Ministry stated that it was in the process of reviewing its original decision. The appellant asked that her appeal move to the adjudication stage. At the onset of adjudication, the Ministry had not produced the records at issue to the IPC. Consequently I issued a production order, directing the Ministry to produce the records at issue in this appeal to the IPC. In response, the Ministry provided a set of records to the IPC but did not change its position with respect to disclosure of the responsive records to the appellant.

I began the adjudication by issuing a Notice of Inquiry to the Ministry and asking for their written representations, which the Ministry provided. In its representations, the Ministry stated that, after receiving the Notice of Inquiry, it released portions of the records to the appellant. It also withdrew its claim to sections 14(1)(a), 14(1)(b), 14(1)(f) and 14(2)(a) as grounds for non-disclosure of the responsive information. I then sent a Notice of Inquiry to the appellant, along with the complete representations of the Ministry. The appellant responded by providing representations.

RECORDS

The records at issue in this appeal include both paper and electronic records. As mentioned, portions of these records were disclosed to the appellant by the Ministry in response to the first Notice of Inquiry. In addition to the exemptions claimed, the Ministry also takes the position that parts of these records are not responsive to the appellant's request.

Paper Records

Pages	Type of Record
1 to 7	OPP incident LP03120166 General occurrence report Notes, reports and supplementary occurrence reports
8 to 62	Police officers' notes (9 officers)
63 to 66	E-mail correspondence
67	Firearms Interest Person (FIP) record
68 to 69	E-mail correspondence
70 to 74	Canadian Firearms Registration On-line (CFRO) queries
75 to 78	Fax correspondence

Electronic Records

One CD, containing 41 photographs taken by the OPP

One videotape, containing footage taken by the OPP of the exterior and interior of a property

DISCUSSION:

SCOPE OF REQUEST/RESPONSIVENESS OF RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In its index of exempted records, the Ministry stated that the shaded parts of certain records contain information that is not responsive to the request. The Ministry submitted that only those portions of the requested records that relate to the appellant's own firearms licensing issues and related criminal charges are responsive to the request.

In its representations, the Ministry stated the following:

> The Ministry does not consider the following categories of information to be reasonably responsive to the appellant's very specific and highly detailed request:
>
> - Information relating to [the named individual's] legal issues;
> - Information concerning unrelated law enforcement activities at the appellant's residence prior to the finding of firearms;
> - Information concerning unrelated law enforcement and administrative matters;
> - Personal information concerning other individuals;
> - Information concerning the on/off duty times of police officers, meal times of police officers, police vehicle information, weather conditions, road conditions, shift preparation information and printing information relating to OPP reports (date, time and badge number of individual printing the report)

In determining the issue of which records are responsive to the appellant's request, I have reviewed the records and, for ease of reference, will consider them in three groups:

Group 1 Information relating to the appellant, the named individual's legal issues and information concerning the law enforcement activities at the appellant's residence prior to the finding of firearms.

Group 2 Information concerning other law enforcement and administrative matters.

Group 3 Information concerning the on/off duty times of police officers, meal times of police officers, police vehicle information, weather conditions, road conditions, shift preparation information, printing information relating to OPP reports (date, time and badge number of individual printing the report) and police "ten" codes.

Group 1 Records

In considering whether Group 1 records are responsive to the appellant's request, the context provided in the appellant's representations is relevant:

> On July 18, 200[3], a Search Warrant was executed at the Appellant's home regarding a legal matter unrelated to this request. …During the search of the property the OPP seized two firearms, a rifle and a shotgun, both unloaded from an upstairs bedroom that overlooks the lane, the chicken pens and the sheep barn. They also seized 16 shotgun shells in an ammunition belt stored in an armoire … and 31 bullets for a .22-250 varmint rifle stored in a cabinet in a separate room on the lower floor of the house. When they were finished their search, D/C Gary Wight of the OPP called the Appellant on her cell phone and advised her that property unrelated to this request had been removed from the farm house, and the firearms had been seized.
>
> On October 21, fully three months later, the Appellant and her life partner, [named individual], were both charged under the Criminal Code of Canada with one count each under section 86(1) of the Criminal Code of Canada with careless storage of firearms and ammunition and with careless storage of firearms under s.117(h) of the Firearms Act contrary to Section 86(2) of the Criminal Code of Canada.
>
> …
>
> On July 2, 2004 the charges were withdrawn in consideration of [their] having no prospect of conviction.

In her representations, the appellant submits that her request relates to any information "generated or received" in relation to "Police Case ID C03036520 Occurrence #LP03120166." Further, the appellant states:

> In this regard, the Appellant was co-accused with her life-partner, [named individual]. [Named individual] has submitted a waiver with respect to his privacy rights regarding this Police Case and Occurrence.
>
> The Appellant submits that – as it concerns the Police Case and Occurrence which is the subject of the request – information relating to that specific aspect of [named individual's] legal issues – those in which he was co-accused with the

> Appellant – should not be exempt. The Appellant is not seeking information relating to any other legal matters, nor has [named individual] waived his rights regarding any other matters. The Appellant submits that any "generated or received" information regarding her co-accused in this matter also relates to her and should be provided.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. In reviewing the records at issue in this appeal, and considering the representations of the parties, I find that the records in Group 1 are responsive to the appellant's request. The records that the Ministry considered responsive were generated as a result of the execution of the warrant referred to in the appellant's representations. However, the Ministry has severed as unresponsive all but the small portion of those records relating to the charges against the appellant. However, I have concluded that, in doing so, the Ministry has adopted an overly narrow approach to determining responsiveness. I accept that the search of the appellant's property was not initially undertaken with a view to potential charges against her. However, in my view, the circumstances of that search become relevant to her request given that charges were subsequently laid against her as a result of the search. There is a direct connection between the execution of the search warrant, the discovery of the firearms and the laying of charges against the appellant. The events of that day as they relate to the execution of the warrant are therefore relevant to the charges laid against the appellant and her request.

The portions of the Group 1 records that are not responsive to the appellant's request include information regarding the unrelated law enforcement matters that concern the named individual. The appellant's request makes it clear that she is not seeking access to this information and therefore, that information does not fall within the scope of the request.

Therefore, I find that the portions of the following Group 1 records that the Ministry had considered unresponsive to the request are, in fact, responsive:

Records 4, 5, 15-23, 24-26 (except as they refer to an unrelated law enforcement matter), 27-39, 40 (except as it refers to an unrelated law enforcement matter), 41 and 42 (except the information that appears under the heading Tuesday, July 13th, 2004) 55, 56 (except as it refers to an unrelated law enforcement matter), 57, 68 (except as it refers to an unrelated law enforcement matter), 69, the CD containing 41 photographs and the video tape.

The Ministry has released a small portion of Record 10 and claimed that the remaining portions of the Record were unresponsive. In particular, it claimed the reference in Record 10 to the named individual was unresponsive. I disagree and find that the reference to the named individual in Record 10 is responsive. Since the Ministry has not claimed any exemptions for that portion of Record 10 that refers to the named individual, and the named individual has provided his consent, section 21(1)(a) is applicable and the Ministry must disclose that portion to the appellant. Record 10 also contains law enforcement information related to individuals other than the appellant and the named individual which I find to be unresponsive for the reasons outlined below in my discussion relating to the Group 2 Records.

A portion of Records 68 and 69 has been released to the appellant. As I have found that Record 68 contains responsive information and Record 69 is responsive in its entirety, and the Ministry has not claimed any exemptions with respect to these Records and no mandatory exemption applies, I order that the responsive portions of Record 68, and Record 69, in its entirety, be disclosed to the appellant.

Group 2 Records

Group 2 is comprised of records that concern other law enforcement and administrative matters. I have carefully reviewed the records and have identified a number that clearly are unrelated to the execution of the warrant at the appellant's property and the resulting charges laid against her. For example, entries in officers' notebooks contain references to individuals and incidents that are totally unrelated to the appellant or the named individual. They also contain information that refers to an unrelated law enforcement matter of the named individual that is not responsive to the appellant's request. I therefore find that the portions of the following records identified as unresponsive by the Ministry are, in fact, unresponsive to the appellant's request:

Records 8, 9, 10 (except as it refers to the named individual), 11, 12, 13, 43 to 54, 60, 61, 62, 63, 70, 71, 73 and 74.

Record 10 contains information that is responsive and has been released, information that is unresponsive, and information that is responsive and has not been released. As previously noted, the portion of Record 10 that has not been released, and that is responsive, is the portion that refers to the named individual. As the Ministry has not claimed any exemptions with respect to that portion of Record 10, and as the named individual has provided his consent so that the mandatory exemption in section 21 does not apply, I have ordered above that it be disclosed to the appellant.

The Ministry released portions of records 8, 9, 11, 70, 71, 73 and 74. As I have found above that the portions of these records that the Ministry withheld as unresponsive are, in fact, unresponsive, I uphold the Ministry's decision to withhold portions of these records. Since the responsive portions of these records have already been released to the appellant, these records are no longer at issue in this appeal.

Record 72 has been released in its entirety and it is therefore no longer at issue in this appeal.

Group 3 Records

Records in Group 3 contain information concerning the on/off duty times of police officers, meal times of police officers, police vehicle information, weather conditions, road conditions, shift preparation information, printing information relating to OPP reports (date, time and badge number of individual printing the report) and police operational "ten" codes.

In her representations, the Appellant does not object to the characterization of these records as non-responsive, with one exception. That exception relates to "printing information related to OPP reports."

In this regard, the Appellant submits:

> While the Appellant is not clear as to the exact meaning of this phrase, the Appellant would submit if an OPP report containing the incorrect Police Case Id number provided to Constable Lynn Pretty (Page 9 of the Ministry's released record) was printed and provided to her or any other officer, the information about where the report originated, the date, and the creator of the information/Ministry and/or department would be relevant to this request and should be released.

I have reviewed the records where the Ministry has indicated that printing information is non-responsive. The notations relating to printing do not respond to the concern raised by the appellant, nor do they appear to relate to the execution of the warrant at the appellant's property and the resulting charges. Therefore I find that, although these notations appear to be innocuous, they are properly characterized as non-responsive to the appellant's request.

With respect to the "ten" codes, the appellant commented on the Ministry's application of an exemption to this information but added that the "ten" codes were virtually irrelevant to her appeal and that she would be satisfied with the release of the records with the "ten" codes severed. In view of the consent of the appellant to the severance of the "ten" codes from the responsive records, I am not including the issue of "ten" codes in the scope of this appeal.

I therefore uphold the Ministry's decision to withhold the shaded portions of the following records:

1, 2, 3, 4 and 5 (except as they refer to the named individual) 6, 7, 58, and 59 and those portions of the records that refer to the police "ten" codes. The note at the bottom of Record 14 is, although unshaded, not responsive.

SUMMARY

The Ministry has not claimed any exemptions with respect to the records 8 to 11 and 67 to 69. The result is that the responsive portions of these records should be released to the appellant and they are no longer at issue in this appeal. The responsive portions of Records 70 to 74 have already been released to the appellant and they are no longer at issue in this appeal. Further, Records 75 to 78 were released in full to the appellant and they are no longer at issue in this appeal.

The following records are responsive to this request and have not been released, or ordered to be released, to the appellant:

1-7 (except the printing information);

12-13 (the unshaded portions);
14-23;
24-26 (except as they refer to an unrelated law enforcement matter);
27-39;
40 (except as it refers to an unrelated law enforcement matter);
41 (except the information that appears under the heading Tuesday, July 13, 2004);
42 - 44 (the unshaded portions);
45 – 52 (the unshaded portions);
53 (the unshaded portion except the information that refers to an unrelated law enforcement matter on lines 22-24);
54 (the unshaded portion);
55;
56 (except the information that refers to an unrelated law enforcement matter);
57;
58 - 62 (the unshaded portions);
63-66 (the unshaded portions);
CD containing 41 photographs; and,
video tape.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with section 19 with respect to the following records:

Records 1-7	Typewritten Occurrence Reports and Notes Reports prepared by OPP officers [occurrence reports]
Records 12-62	Handwritten notes prepared by OPP officers [notes]
Records 63-66	Emails among OPP officers [emails]
Photographs and video	

Personal Information

As the section 49 exemption applies only to information that qualifies as "personal information", I must first determine whether the records contain personal information and if so, to whom that information relates. Personal information is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits that the CD of photographs, video tape and police officers notes contain the personal information of the appellant and the named individual and the personal information of individuals other than the appellant and the named individual. The Ministry made no submissions with respect to the personal information contained in the other records for which it claimed the right to the discretionary exemption found in section 49(a) and section 19.

The appellant agrees that the CD of photographs and the video tape contain her personal information. The appellant submits that she is willing to admit that the names of third parties should be severed from the responsive records. She submits that the named individual has "waived his privacy rights in this very narrow matter". The appellant adds that it is the adjudicator who may be best positioned to determine what does and what does not constitute personal information.

Having reviewed the records for which the Ministry has claimed the section 19 exemption, I find that they all contain the personal information of the appellant. Some of the records also contain the personal information of the named individual and other individuals.

Solicitor-Client Privilege

At the date the request was filed, section 19 stated:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c.28, Sched. F, s.4.) However, the amendments are not retroactive, and the version I have just quoted therefore applies in this appeal. In any event, the amendments, which address the addition of universities to the body of "institutions" subject to the *Act*, have no bearing in this case.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law solicitor-client communication privilege

Branch 1 applies only to records that are subject to common law solicitor-client communication privilege. [Order PO-2483, PO-2484]

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. [Order P-1551]

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The occurrence reports and the notes (Records 1-7, 12-62), as well as the photographs and videotape, do not reveal any communications between a solicitor and a client.

Records 63-65 consist of an email chain among OPP officers on the topic of firearms testing. In Record 63 one officer asks another whether the Crown has ascertained a particular fact. There is no actual communication to or from a Crown counsel contained in or revealed by Records 63-65, nor does it reveal a request for legal advice. Therefore, solicitor-client communication privilege does not apply to Records 63-65.

Record 66 is also an email chain among OPP officers. One of the emails reveals (in one sentence) specific information about the status of a particular charge that a Crown counsel had provided to one of the officers.

Communications between police and Crown counsel may be privileged, but only if certain conditions are met. In *R. v. Campbell*, [1999] 1 S.C.R. 565, the Supreme Court of Canada found that privilege applied to communications between a Royal Canadian Mounted Police (RCMP) officer and a federal Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP. The court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege. The Court stated that

> [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

This office has applied *Campbell* in several cases (for example, Orders PO-1779, PO-1931, MO-1241). In each of these cases, privilege was found on the basis that the police sought legal advice from Crown counsel.

In Order MO-1663-F, Adjudicator Sherry Liang stated the following with respect to notes created by a police officer and directed to a Crown Attorney that were intended to be used in the prosecution of the appellant:

> In the appeal before me, I find there is an insufficient basis to conclude that the communications [in the notes] were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

Similarly, in this case, there is nothing in Record 66, in the surrounding circumstances, or in the representations before me, to establish that this communication with respect to the status of the charges occurred as part of the seeking of legal advice by the OPP from the Crown.

Accordingly, none of the records remaining at issue are exempt under Branch 1 of section 19, in conjunction with section 49(a) of the *Act*.

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Based on my review of the Ministry's representations, it does not appear that the Ministry is claiming that this part of Branch 2 applies. Further, none of the records appears to have been prepared by or for Crown counsel specifically for use in giving legal advice. Therefore, the statutory solicitor-client communication privilege does not apply.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

The Ministry submits:

> . . . Branch 1 and 2 of section 19 are applicable in the circumstances of the appellant's request. The requested records came into existence as a result of the prosecution involving the appellant . . . [T]he content of the records exempted in accordance with section 19 is supportive of its position in this regard.

> In Order P-613, former Inquiry Officer Anita Fineberg concluded that this Ministry had appropriately applied section 19 to exempt from disclosure a Crown brief that was prepared by members of the OPP for Crown counsel in contemplation of litigation. The Crown brief is the report of the police findings into an investigation and is created especially for contemplated litigation. The brief is used by Crown counsel as an aid to the conduct of litigation. The Crown brief contains the underlying factual material and considerations for use by Crown counsel in a criminal prosecution.
>
> The Ministry has consulted with the Ministry of the Attorney General and confirmed many of the withheld records are included in the Crown brief documents maintained by Crown counsel for the purposes of a criminal prosecution. The exemption under Branch 2 of section 19 does not end when the relevant litigation has been completed.
>
> The Crown brief material includes the OPP video, CD of photographs, notes prepared by [named] OPP officers . . . and e-mail correspondence from [named] OPP officers . . .
>
> Other documents do not appear to be contained within the Crown brief material but reflect confidential communications and instructions provided by Crown counsel to the OPP in the context of a prosecution. These documents include notes prepared by [two named] OPP officers . . .

The Ministry concedes that the Crown brief did not contain the notes of two named officers [Records 45-53, 62]. In the circumstances, there is insufficient evidence to establish that these records were prepared for Crown counsel for use in litigation.

The emails among OPP officers (Records 63-66) clearly were not prepared by Crown counsel. In addition, the Ministry has not submitted persuasive evidence that these records were prepared for Crown counsel in contemplation of or for use in litigation, and their contents do not suggest that they were so prepared.

With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.

The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and

second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

There is no question that the *Act* contains provisions that protect the process where the police investigate potential violations of law and decide whether to lay criminal charges. This protection is found primarily in section 14 of the *Act*, the comprehensive "law enforcement" exemption.

However, in this case, the Ministry does not rely on section 14 of the *Act*.

If I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the *Act*. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The broad rationale of public accountability underlying freedom of information schemes . . . requires some degree of openness with respect to the conduct of law enforcement activity . . . (p. 294)

Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege.

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario [see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (*i.e.*, the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (*i.e.*, investigation files held by the police). However, courts have made findings of this nature with respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), the majority of the court stated:

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of

> advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. *In some cases the copies may be privileged even though the originals are not.* [emphasis added]

I note that in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 360-361, 370 (C.A.), the majority of the Court of Appeal, in *obiter dicta*, agreed with the above statement [see also *R. v. CIBC Mellon Trust Co.* [2000] O.J. No. 4584 (S.C.)].

Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

The Ministry relies on Order P-613 to support its position that records contained in the Crown brief are automatically exempt because they meet the "prepared for Crown counsel for use in litigation" test.

Order P-613 was decided almost 12 years ago. On the relevant point, no order of this office has followed Order P-613. I note also that the adjudicator in that case did not explain in any detail why she made her finding on this issue.

I note that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)]. To the extent that Order P-613 may conflict with my decision in this case, I decline to follow it.

To conclude, I find that all of the records remaining at issue were not "prepared for Crown counsel in contemplation of or for use in litigation" and are not exempt under branch 2 of section 19.

Since neither branch 1 nor branch 2 applies, section 19 does not apply to any of the records at issue.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF OTHER INDIVIDUALS

The Ministry submits that it has the discretion under section 49(b) in conjunction with section 21(3)(d) to deny access to the personal information of the appellant set out in records 1 to 7. The Ministry claims the application of sections 49(b) in conjunction with sections 21(2)(f) and 21(3)(b) to deny access to the personal information of the appellant contained in the OPP photographs and video tape. The Ministry also submits that it has the discretion under section

49(b) in conjunction with sections 21(2)(f), 21(3)(b) and 21(3)(d) to deny access to the personal information of the appellant contained in the responsive portions of seven OPP police officers' notes previously identified above as pages 12 to 62 of the paper records.

I will initially consider the application of sections 49(b) and 21(3)(d) to records 1 to 7. Then, I will consider the application of sections 49(b), 21(2)(f) and 21(3)(b) to the video tape and photographs. Finally, I will consider the application of section 49(b) in conjunction with sections 21(2)(f), 21(3)(b)and 21(3)(d) to the responsive portions of the OPP officers notes.

Records 1 to 7

I have found that the shaded portions of these records that include information relating to their printing are not responsive. Given that I have found that the remaining portions of the records are responsive including the references to the named individual, I must consider the application of the discretionary exemptions claimed to these records.

As with the application of section 49(a), I must initially determine whether the records contain personal information and to whom that information relates. I have reviewed the representations of the parties and records 1 to 7. Having done so, I am satisfied that they contain the personal information of the appellant and the named individual and they do not contain the personal information of any other individuals.

As noted above, section 49 provides a number of exemptions from the general right of access found in section 47 of the *Act.* Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) an institution has the discretion to deny an individual access to their own personal information where the disclosure would constitute an unjustified invasion of another individual's personal privacy. As the records contain the personal information of the named individual, I must consider whether the disclosure of these records would constitute an unjustified invasion of the named individual's privacy under the *Act* and are thereby exempt under section 49(b).

Like section 49(a), because section 49(b) is a discretionary exemption, even if the information falls within the scope of one of the listed sections, the Ministry must nevertheless consider whether to disclose the information to the requester. The exercise of discretion under section 49(b) involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

The factors and presumptions in sections 21(1) to (4) provide guidance in determining whether disclosure would or would not be an "unjustified invasion of personal privacy" under section 49(b). If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 49(b). Section 21(2) provides some criteria for the head to consider. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) (Order P-1456, citing *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

Section 21(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

The Ministry clearly states that it is not claiming the application of section 49(b) in relation to any of the personal information of the named individual. The Ministry did not make any representations on the application of section 21(1)(a) to the circumstances of this appeal.

The appellant referred to the consent filed by the named individual in her submissions but made no representations on the application of section 21(1)(a) of the *Act*.

Analysis and Findings

Having reviewed the representations of the parties and the responsive portions of the records, I find that as the only information in records 1 to 7, other than the personal information of the appellant, is the personal information of the named individual, and that information is responsive to the request, section 21(1)(a) applies. As the named individual has consented to the disclosure to the appellant of his personal information, it should be released and to do so would not be an unjustified invasion of privacy under section 49(b) of the *Act.*

Having found that the responsive portions of records 1 to 7 can be released to the appellant in accordance with section 21(1)(a) of the *Act,* it is not necessary for me to consider the Ministry's argument regarding the application of section 21(3)(d).

Photographs and Video Tape

I will initially determine whether the photographs and the video tape contain personal information and to whom that information relates. I have reviewed the representations of the parties and the CD of photographs and the video tape. Having done so, I am satisfied that the video tape contains the personal information of the appellant and the named individual. The video tape does not contain personal information of any other individuals.

I am also satisfied that all of the photographs contain the personal information of the appellant and the named individual. Photographs numbered 9 and 15 to 22 contain, in addition to the personal information of the appellant and the named individual, the personal information of other individuals.

I turn to consider the application of section 49(b) to the personal information of the named individual and the other individuals in the CD of photographs and the video tape.

As stated above, under section 49(b) an institution has the discretion to deny an individual access to their own personal information where the disclosure would constitute an unjustified invasion of another individual's personal privacy. As I have found that the CD of photographs and the video contain the personal information of the appellant and one or more other individuals, I must therefore, consider whether the disclosure of the personal information of the appellant would be an unjustified invasion of the personal privacy of the named individual and the other individuals.

I must consider the factors and presumptions in sections 21(1) to (4) as guidance in determining whether disclosure would or would not be an "unjustified invasion of personal privacy" under section 49(b).

With respect to the personal information of the named individual, I have noted above that he has provided his consent to the disclosure of his personal information that is responsive to the request of the appellant. That consent clearly applies to the personal information of the named individual that appears in both the video tape and the CD of photographs.

As noted, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 49(b).

Neither party made any representations with respect to the application of section 21(1)(a) of the *Act* to the information contained in the CD of photographs and the video tape.

Analysis and Findings – Photographs and Videotape

Having reviewed the video tape and the CD of photographs, the authorization signed by the named individual and the representations of the parties, I find that the named individual has consented to the disclosure of his personal information contained in those records under section 21(1)(a) of the *Act*. That consent was signed by the named individual and attached to the appellant's original request and it clearly applies to the information contained in the video tape and to the photographs, other than photographs numbered 9 and 15 to 22.

As previously noted, the submissions of the appellant indicate that the appellant is not seeking access to any information regarding the unrelated law enforcement matter of the named individual. The information contained in the photographs that are numbered 9 and 15 to 22 on the CD of photographs relates to the unrelated law enforcement matter and not the matter for which the appellant and the named individual were co-accused. Nor does the authorization of

the named individual extend to these photographs. In view of these findings, section 21(1)(a) does not apply to these photographs.

Therefore, the disclosure of the video tape and the photographs, other than photographs numbered 9 and 15 to 22, is not an unjustified invasion of privacy under section 49(b) of the *Act.* In view of this finding, it is not necessary for me to consider the Ministry's argument with respect to the application of sections 21(3)(b) and 21(2)(f) to these records.

Photographs numbered 9 and 15 to 22 contain the personal information of the appellant and the named individual and of individuals who have not consented to their release under section 21(1)(a) of the *Act.* I now turn to consider the application of section 49(b) and 21(3)(b) to the information of the named individual and the other individuals whose personal information is contained in these photographs.

The Ministry takes the position that the presumption in section 21(3)(b) applies to the CD of photographs. Section 21(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry states:

> The Ministry is of the opinion that the personal information remaining at issue consists of personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. As noted earlier, the OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The Police Services Act provides for the composition, authority and jurisdiction of the OPP. Some of the duties of a police officer include investigating possible violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.
>
> The exempt information documents the law enforcement investigation undertaken by the OPP that resulted in the laying of Criminal Code charges against both the appellant and her spouse. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The Ministry submits that release of this information is presumed to constitute an unjustified invasion of the personal privacy of other individuals.

> The Ministry refers to the content of the withheld records in support of its position in this regard.

The appellant did not make any submissions on the application of the presumption found in section 21(3)(b).

Having reviewed the photographs numbered 9 and 15 to 22 and the representations of the parties, I am satisfied that they were compiled by the Ministry in the course of the police investigation into the possible violation of law. As a result, the information contained in these records falls within section 21(3)(b) of the *Act.* The disclosure of these photographs is, therefore, presumed to constitute an unjustified invasion of privacy by virtue of section 21(3)(b). I am also satisfied that sections 21(4) and 23 do not apply. Accordingly, photographs numbered 9 and 15 to 22 are exempt from disclosure under section 49(b) of the *Act,* subject to my review of the Ministry's exercise of discretion under section 49.

Police Officers' Notes

I now turn to consider the application of section 49(b) in conjunction with sections 21(2)(f), 21(3)(b) and 21(3)(d) of the *Act* to the responsive portions of the seven police officers' notes.

Analysis and Findings

I have reviewed the responsive portions of the police officers notes identified above and find that they contain the personal information of the appellant and of the named individual. Some of the information in the police officers' notes relates to unrelated law enforcement matters including unrelated law enforcement matters of the named individual. I have already found that unrelated law enforcement information of the named individual and of other individuals is not responsive and I will not consider the application of section 49(b) to that unresponsive information.

I find that the named individual has consented to the disclosure of his personal information contained in the responsive portions of the police officers notes under section 21(1)(a) of the *Act*. That consent clearly applies to the information contained in the responsive records which contain his personal information.

Therefore, the disclosure of the police officers' notes, other than the portions that I have identified as unresponsive, is not an unjustified invasion of privacy under section 49(b) of the *Act.* In view of this finding, it is not necessary for me to consider the Ministry's argument with respect to the application of sections 21(3)(b), 21(3)(d) and 21(2)(f) to these records.

EXERCISE OF DISCRETION

As previously stated, the sections 49(a) and (b) exemptions are discretionary, and permit the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629). I must

consider whether the Ministry exercised its discretion. In addition, I must consider whether the Ministry erred in exercising its discretion. For example, whether,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect

- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

In light of my finding that section 49(a) in conjunction with section 19 and section 14(1)(l) do not apply to the records at issue in this appeal, I need not review the Ministry's exercise of discretion under those sections. I turn to consider whether the Ministry properly exercised its discretion to withhold the information contained in the following records to which I have found section 49(b) applies; e.g. photographs numbered 9 and 15 to 22.

The Ministry made detailed submissions in support of its claim that it properly exercised its discretion not to disclose to the appellant the information which is exempt under section 49(b) in conjunction with the personal privacy sections of the *Act*.

The Ministry submitted that it had regard for the purposes of the *Act*, the appellant's right to access her own personal information, the fact that the records relate to charges that were ultimately withdrawn, the potential benefits to the appellant should the records be disclosed, the impact on public confidence in the delivery of services, the consent of the named individual to the disclosure and the court imposed restrictions relating to the information in the records.

The Ministry's representations were shared with the appellant, who also provided representations on this issue. The appellant stated that many members of the public have expressed an interest in the circumstances surrounding the laying of charges against her and the named individual and that the media reported more widely on the news of her arrest than they did on the withdrawal of the charges.

Analysis and Findings

I have carefully considered the representations of the Ministry and the appellant's reasons for seeking access, as well as the contents of the records. I have taken into account the submissions of the appellant on this issue and the nature of the information of the other individuals that is at issue. I find that the Ministry has properly exercised its discretion under section 49(b) not to disclose those portions of the records which contain the personal information of individuals other than the appellant and the named individual. I find nothing in the manner in which the Ministry exercised its discretion that would warrant my sending the matter back for a re-exercise of discretion. I therefore, uphold the Ministry's exercise of discretion in this case.

In summary, I find that the discretionary exemptions under section 49(b) of the *Act* only applies to the photographs numbered 9 and 15 to 22 on the CD of photographs and in view of my finding that the Ministry has properly exercised its discretion under section 49(b), those photographs should not be disclosed to the appellant.

CORRECTION

The appellant made extensive submissions regarding her right to have her personal information contained in the CFC database corrected. The appellant made an application with the Ministry of the Attorney General to have her personal information corrected on March 21, 2005 approximately one year following the filing of the access request that is the subject of this appeal. The appellant has not been able to reach a satisfactory conclusion to that correction

request to date and submits that she has been passed between various Ministry and other government organizations in her efforts to achieve this.

The request that resulted in this appeal was for access to information only. Although the appellant had some discussions about her concerns regarding the correction of her records at the mediation stage of the process, at no time was correction ever made an issue in this appeal.

Although I have great sympathy for the position advanced by the appellant, I do not have jurisdiction to make a ruling on the request for a correction of the records in this appeal.

ORDER:

1. I uphold the decision of the Ministry not to disclose the information at issue that I have found to be exempt or unresponsive. For greater certainty, this is the information that is *not* highlighted in colour on a copy of the records provided to the Ministry with this order. Exempt information also includes photographs numbered 9 and 15 to 22 on the CD of photographs.

2. I order the Ministry to disclose to the appellant the information that I have found to be responsive and not exempt. For greater certainty, this is the information that is highlighted in colour on the copy of the records provided to the Ministry with this order. This also includes video tape and the photographs on the CD of photographs with the exception of photographs numbered 9 and 15 to 22. The Ministry is ordered to disclose this information by sending a copy to the appellant by **September 15, 2006**.

3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed By: August 14, 2006
Brian Beamish
Assistant Commissioner